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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

C.V. ALSTON, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that petitioners failed to state a claim under the Magnuson-Moss Warranty Act, where petitioners alleged that: (1) their General Motors vehicles were equipped with defectively designed diesel engines; (2) this defective design already had resulted in the catastrophic and premature failure of as many as one-third of all such engines; (3) the defective design, and excessive failure rate, precluded all such GM diesel vehicles from passing without objection in the used car trade; and (4) this breach caused petitioners harm in the form of severely diminished resale value.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

In addition to the named cross-petitioner C. V. Alston, the cross-petitioners include the other 12 plaintiffs whose only claims, for diminished resale market value, were dismissed: Mary J. Fahey, Dennis B. Harrison, Doyle C. Hayden, Robert Hudson, Marvin Mabry, Vicki Mays, Zelma Pettit, Henry R. Sims, Sunbelt Thread & Tape, Inc., Marvin Williams, Roy C. Young, and David S. Brynside, Jr. The only corporate cross-petitioner, Sunbelt Thread & Tape, Inc., has no parent or subsidiary entities as far as counsel is aware. The uncertified class that cross-petitioners seek to represent is described in the Petition for a Writ of Certiorari filed by the respondent General Motors Corporation on January 22, 1990, at ii, and the corporate subsidiaries of respondent are listed therein at 51a-53a.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Carlson v. General Motors Corp.*, 883 F.2d 287, 297-298 (4th Cir. 1989), and is reproduced in the Appendix bound with Respondent's Petition for a Writ of Certiorari, filed January 22, 1990, at 1a-23a.[1] The Court of Appeals

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[1]Because the claims of Mary A. Carlson, the lead plaintiff in *Carlson v. General Motors Corp.*, survived that decision, C.V. Alston has been substituted as the lead cross-petitioner here seeking review of that portion

(footnote continued on next page)

denied Cross-Petitioners'/Appellants' Petition for Rehearing by an unreported Order filed October 24, 1989, which is reproduced at 46a-48a. The unreported April 2, 1988 Order of the District Court is reproduced (without Appendices) at 24a-42a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1989, and reaffirmed by the denial of a timely petition for rehearing on October 24, 1989 (46a-48a). Respondent filed a timely Petition for a Writ of Certiorari on January 22, 1990, which was received by counsel for cross-petitioners on January 25, 1990 and which this Court has jurisdiction to entertain pursuant to 28 U.S.C. §1254(1). This Cross-Petition is filed pursuant to Rule 19.5 of this Court.

STATUTORY PROVISIONS AT ISSUE

The Magnuson-Moss Warranty—Federal Trade Commission Improvements Act ("the Act"), 15 U.S.C. §2310(d)(1), provides that "a consumer who is damaged by the failure of a supplier [or] warrantor to comply with any obligation under...[an] implied warranty... may bring suit for damages...." An "implied warranty" is defined in 15 U.S.C. §2301(7) as

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of the decision (20a-22a) dismissing his and others' claims (*see* Statement at ii) that a defective design, causing severely diminished resale value, breached implied warranties of merchantability.

"an implied warranty arising under state law...." The state law definitions of "implied warranty" relevant here are codified in the Uniform Commercial Code ("UCC") §2-314(2)(c), which provides that goods to be merchantable must be at least such as "are fit for the ordinary purposes for which such goods are used," and in UCC §2-314(2)(a), which provides that goods to be merchantable must be at least such as "pass without objection in the trade under the contract description."

STATEMENT OF THE CASE

This class action was brought on behalf of owners of General Motors ("GM") automobiles and light trucks equipped in model years 1981-1985 with 5.7 liter GM diesel engines. Plaintiffs allege that these GM diesel engines have had an extraordinarily high rate of premature, catastrophic, and expensive-to-repair failures, resulting from defective design.[2] Plaintiffs' expert "conservatively estimated" that the GM diesel

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[2]In response to these widespread engine failures, thousands of frustrated GM diesel owners organized groups to seek relief, such as: Lemon on Wheels (New York); Diesel Users Demanding Satisfaction (DUDS) (Illinois); Disgruntled Diesel Owners Group (Virginia); Consumers Against GM (Washington); Dieselgate (Oregon); and Dissatisfied Owners of General Motors Automotive Diesels (DOGMAD) (California). Another Magnuson-Moss class action was brought with respect to some 479,000 1978-1980 model year GM motor vehicles that were also equipped with 5.7 liter GM diesel engines. That case, *Kaplan v. General Motors Corp.*, No. 81-CV-1252 (E.D.N.Y.), was settled in 1984 for $22.5 million.

catastrophic failure rate is already as high as one in three.[3]

However, the difficulties for GM diesel owners did not end with the many expensive (and often repeated) engine repairs. *All* 5.7 liter GM diesels carry the same latently defective design, and because such an extraordinarily high percentage of these GM diesels failed, the used car market came to severely discount the resale values of *all* vehicles with these engines.

The extent of the diminished resale value is reflected in regularly issued and respected publications, "Blue Books", that report resale value guides for vehicles of virtually every manufacturer, model, year and type. Plaintiffs' expert noted that these same "Blue Books" are "almost universally" used by used car dealers and by new car dealers accepting trade-ins.[4]

Using "Blue Book" data, plaintiffs' expert calculated the difference in resale value between GM vehicles that were identical in all respects, except for their diesel or non-diesel engines. Vehicles with 5.7 liter GM diesels uniformly had significantly lower resale values than the

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[3]The Affidavit of Gerald Rosenbluth [hereinafter "Aff."], ¶7 (57a), is reproduced as Appendix G bound with this Cross-Petition at 54a-61a (the pages consecutively numbered with those in the Appendices bound with the Petition). This affidavit was submitted to the District Court to illustrate what plaintiffs reasonably expect to prove. The voluminous Exhibits to that Affidavit have been omitted from the printed Appendix to this Cross-Petition, but ten copies of the entire Affidavit with Exhibits have been lodged with the Clerk.

[4]Aff., ¶15 (58a).

same model (and model year) with a gasoline engine.[5] The difference between the resale value of otherwise identical vehicles amounted, on average, to about one-third of the resale value of a vehicle with a gasoline engine.[6] Once the used car market reacted to the extraordinarily high GM diesel premature failure rate, this excessively diminished resale market value confronted *every* original owner who sought to sell a GM diesel in the used car market, regardless of whether the particular vehicle previously had experienced an engine failure.[7]

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[5]Aff., ¶17 (59a-60a).

[6]*Id.*

[7]The used car market prices vehicles based on the average failure *risks* associated with identically designed and more or less fungible cars. That market imposed the same reduction for all 5.7 liter GM diesels of a particular year, make, and model, *e.g.*, $2,000, whether or not the engine in a particular car had previously failed.

A few typical examples illustrate this impact:[8]

Make Model/Year	Add'l Reduction of Resale Value for Diesel Engine	Diminished Resale Value Percentage
GM Cadillac DeVille 1984	$3530	29.82%
GM Buick Century 1981	$1665	45.58%
GM Chevrolet Impala 1982	$1935	41.52%
GM Pontiac Bonneville 1982	$1935	47.20%
GM Oldsmobile Cutlass 1982	$1935	41.79%

In contrast to these GM-made diesels, other manufacturers' diesel versions lost little or no value by comparison to the same year, make, and model vehicle

[8]Aff., Exh. G (lodged with Clerk).

with gasoline engines. The evidence gathered by plaintiffs' expert is illustrated by the following examples:[9]

Make Model/Year	Add'l Reduction of Resale Value for Diesel Engine	Diminished Resale Value Percentage
VW Jetta 1982	$0	0
VW Rabbit 1983	$0	0
Toyota Camry 1984	$0	0
Toyota Camry 1985	$0	0

This evidence shows that it was *GM*'s diesel, apart from changes in fuel price or other extrinsic factors, that caused the significantly diminished resale value of plaintiffs' vehicles. The problems with GM's 5.7 liter diesel were legion, and have been linked by plaintiffs' expert to basic design errors by GM. For example,

[9]Aff., Exh. H (lodged with Clerk).

GM erred by attempting to convert a standard gasoline engine for use with diesel fuel, without adequately compensating for differences in internal pressures that are several times greater in diesel combustion.[10] Because the defects in design affect *all* 5.7 liter GM diesel engines, *all* such GM diesel engines could be likened to ticking time bombs.

Each new model year, GM made minor design changes, and presented its 5.7 liter diesel-equipped vehicles as merchantable. As the continuing high failure rate became manifest, however, the resale value for vehicles with such engines plummeted by comparison to the same model with a gasoline engine.

The market for 5.7 liter GM diesels eventually died. The following chart shows GM production of these vehicles:

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[10]Aff., ¶¶4-5 (55a-56a). The Diesel Automotive Association, an organization devoted to expanding the use of diesel engines in automobiles, wrote GM that "the 5.7 Diesels are malfunctioning in alarming numbers of cases, and many of these, in unusually serious and expensive to repair ways.... [GM] has not been successful in providing a minimally-acceptable, minimally-reliable engine." Aff., ¶13 (58a) & Exh. F (lodged with Clerk). In order to protect the reputation of other (non-GM) diesels, the association asked GM to "consider either withdrawing this engine from the market, extending its warranty, or no longer calling it a 'Diesel.' " *Id.*

1981-1985 GM Production Totals
for 5.7 Liter Diesel Vehicles

Model Year	GM Cars	GM Light Trucks
1981	353,375	20,818
1982	162,204	—
1983	41,708	—
1984	15,497	—
1985	2,762	—

These vehicles were sold at a price that was generally greater than the price of the comparable vehicle with a gasoline engine.[11] The original premium pricing of these diesels reflected new car buyers' expectations regarding diesel resale value. GM's own advertising encouraged this common expectation; GM justified premium prices in part based on promised resale value.

As one advertisement explained: "For a realistic concept of the true value of a diesel-equipped Olds, figure in the phenomenal resale value and the readily available market for used diesel Oldsmobiles." Another advertisement stated: "Cadillac traditionally has one of the highest resale values in its class. When you buy a Diesel Cadillac, that resale value climbs even

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[11] If the diminished resale market value comparisons prepared by plaintiffs' expert had factored in the premium prices paid for GM diesel vehicles, the diminution of value would be even greater.

higher." Notwithstanding such advertising, GM diesels did *not* maintain "phenomenal," "higher," or even normal or near-normal resale value. To the contrary, due to a defective design—of which GM was aware, but which was not apparent to new car buyers—persons who bought these premium-priced GM diesel vehicles found themselves stuck with severely diminished resale values.

In their Amended Complaint, plaintiffs asserted that the defective design, having caused severely diminished resale value, breached the implied warranty of merchantability in two different ways. First, GM diesel vehicles failed to fulfill one of their "ordinary purposes": maintaining fair resale value.[12] This constitutes unmerchantability under the standard of UCC §2-314(2)(c).

Second, GM diesel vehicles failed to "pass without objection in the trade under the contract description."[13] This constitutes unmerchantability under the standard of UCC §2-314(2)(a). This unmerchantability does not depend on whether or not a car engine actually failed, because *all* vehicles equipped with GM diesels suffered the severe diminished resale value whether or not the particular engine had failed.

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[12]The existence of this ordinary purpose is confirmed by GM's own advertising, such as that quoted above. The expectation of resale value sustains a highly organized and efficient used-car market, including trade-ins, in which most new car buyers are eventually sellers.

[13]The used car market's "objection" to these GM diesels was manifested in the significant diminutions in resale value, in the range of $1,000 to $4,000, attributable solely to the vehicle being a GM diesel.

A. *The Proceedings in the District Court*

In the District Court, GM moved to dismiss for failure to satisfy the 100 named plaintiffs class action jurisdictional requirement of 15 U.S.C. §2310(d)(3)(C). Rejecting some of GM's grounds for dismissal on the pleadings, but accepting others, the District Court on April 2, 1988 issued an Order dismissing the claims of all but 53 of the 183 named plaintiffs. (24a-42a.) These dismissals included the diminished resale market value claims of plaintiffs who alleged no mechanical problems with their cars and who are the cross-petitioners herein. (28a-32a.)

The District Court retained jurisdiction over the 53 surviving claims as a multiparty joinder action satisfying the $50,000 aggregation amount in controversy requirement of 15 U.S.C. §2310(d)(3)(B). (36a-37a.) On August 2, 1988, the District Court entered a Judgment pursuant to Rule 54(b), Fed. R. Civ. P., dismissing the claims of all but the 53 surviving plaintiffs, and most of the dismissed plaintiffs, including cross-petitioners, appealed from that Judgment.

B. *The Opinion of the Court of Appeals*

The Court of Appeals reversed in part, reinstating some of the claims that had been dismissed, and remanded for further proceedings with the 100 named plaintiffs class action jurisdiction now restored. The Court of Appeals affirmed, however, as to the 13

owners of GM diesels who alleged no mechanical problems with their own cars, but alleged that defective design and severely diminished market value breached the implied warranty of merchantability. (20a-22a.) That holding gives rise to this Cross-Petition.

REASON FOR GRANTING THE CROSS-PETITION

THIS CASE RAISES AN IMPORTANT QUESTION CONCERNING THE SCOPE OF THE FEDERAL CAUSE OF ACTION UNDER THE MAGNUSON-MOSS WARRANTY ACT.

The court of Appeals decided that, absent functional failure of a product, a latent defect causing severely diminished resale market value does not breach the implied warranty of merchantability. This decision, if allowed to stand, will have a severely negative impact on both the compensatory function and deterrent effect of the Magnuson-Moss Act.[14]

The Court of Appeals has turned the Act's concept of merchantability upside down. Merchantability is intrinsically an economic concept. To largely exclude the concept of resale value undermines the economic

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[14]Civil damage liability for the full range of foreseeable economic consequences, including severely diminished resale value, should be imposed if manufacturers are to have the optimum economic incentive to avoid manufacturing defective products. Likewise, consumers are entitled to the protection enacted by Congress.

protections enacted by Congress.[15] It also ignores the reality of the market for new cars, which, as GM's advertisements confirm, prices new cars to take into account resale value, as well as other factors.

An automobile is one of the most expensive products an American consumer will purchase in his or her lifetime. The Act was passed largely to protect car buyers.[16]

Congress was specifically concerned with the common practice of manufacturers limiting or disclaiming implied warranties. As the House Report emphasized:

> [I]n many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper operated to take away from the consumer the implied warranties of merchantability and fitness

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[15]It is no consolation to owner A, whose diesel had not failed but who received $3,000 less for his or her used GM diesel, that owner B received $3,000 less and *also* had to pay $3,000 in diesel engine repair costs. Owner A still has suffered real economic losses of $3,000, even though Owner A's GM diesel has not yet failed. Moreover, those losses are due to the identical defective design.

[16]The legislative focus on "a rising tide of complaints" from owners of defective automobiles, beginning in the late 1950's and reflected in Federal Trade Commission investigations and reports, is described in H. R. Rep. No. 1107, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7702, 7708-7709.

arising by operation of law leaving little in its stead.[17]

In response, the Act's purpose was "to make warranties on consumer products more...enforceable."[18] *See also In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1137n.53 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) ("the purpose of the Act [is] to provide a more certain remedy than is provided under state law").

Congress imposed federal standards restricting the ability of suppliers of consumer products to limit or disclaim implied warranties, 15 U.S.C. §2308, and created a federal cause of action for breach of an implied warranty, 15 U.S.C. §2310(d)(1), enforceable by private suits brought in state or federal courts. The implied warranty was defined, in 15 U.S.C. §2301(7), as "an implied warranty arising under state law", but was modified by the §2308 federal prohibitions against disclaimers and limitations of such warranties.[19]

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[17] *Id.* at 7706.

[18] *Id.* at 7702.

[19] Congress contemplated that small and routine suits under the Act would be brought in state courts, but preserved federal court jurisdiction for serious and widespread warranty breaches, such as this class action, in which the complaint named the 100 or more plaintiffs required by 15 U.S.C. §2310(d)(3)(C). The 100 named plaintiffs requirement for federal class action jurisdiction was intended to "avoid trivial or insignificant class actions being brought in the Federal courts." *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1006, 1114n.1 (7th Cir. 1979).

Because the express or written warranty given by GM on these diesels only offered to repair or replace failed or defective components, the implied warranty of merchantability is the only means, at least under warranty law, through which these GM owners can pursue their diminished resale value claims.

Without explicitly looking to the law of any particular state, the Court of Appeals held what (to the best of plaintiffs' knowledge) no other federal or state court has ever held: Absent functional impairment of a product, a latent defect causing severely diminished resale value does not breach the implied warranty of merchantability. (20a-22a.)[20] This decision

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[20]The Court of Appeals held that the "ordinary purposes" standard of UCC §2-314(2)(c) "clearly does not encompass consumer expectations that a product will hold its value." (22a.) However, two cases on which the Court of Appeals relied for this proposition did not discuss, much less reject, diminished resale value as a basis for breach of the "ordinary purposes" implied warranty. In *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168, 172-173 (1st Dist. 1972), the car's transmission fell out on the day after purchase, and a week after that was repaired the brakes failed. The court said, "[i]t should be obvious that any car without an adequate transmission and proper brakes is not fit for the ordinary purposes of driving." In *Taterka v. Ford Motor Co.*, 271 N.W.2d 653, 655 (Wis. 1978), a minor rust spot appearing around a taillight after many thousands of miles was not a sufficient impairment to reach the threshold of unmerchantability. Just because these and other cases discuss whether mechanical failures or other functional shortcomings render an automobile "unfit for its ordinary purposes" in the context of providing reliable transportation, it simply does not follow that there are no *other* "ordinary purposes" of buying a new car, including resale value.

The Fourth Circuit similarly misrelied on another legally and factually irrelevant decision, *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1191-1192 (N.D. Ill. 1980), which, like *Taterka*, only reaffirmed the axiom that a product need not be "perfect" or "the best" to

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misconstrues the standards for implied warranty of merchantability statutorily set forth both in UCC §2-314(2)(a) and in UCC §2-314(2)(c).[21]

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be merchantable. In that particular *Skelton* decision, the plaintiffs had not even alleged that GM's "THM-200" automatic transmissions were so failure-prone as to be unfit under UCC §2-314(2)(c). The claim was merely that GM had supplied THM-200 transmissions while representing on the "window sticker" that the cars instead had supposedly higher quality THM-350 transmissions. That merchantability claim was subsequently relabeled more appropriately as one under UCC §2-314(2)(f) (failure to conform to affirmations or promises on the label or container). Subsequently, other plaintiffs developed a §2-314(2)(c) "failures" claim for which class certification was granted, *Skelton v. General Motors Corp.*, 1985-2 Trade Cas. (CCH) ¶66,683 (N.D. Ill.), and the case was later settled.

[21]The Fourth Circuit sought to support its holding by pointing to two cases in which implied warranty claims were dismissed "where plaintiff failed to allege any actual mechanical difficulties with his car" or where "plaintiffs experienced no failures". (22a.) Neither of those cases, however, involved severely diminished resale market value claims remotely similar to the claims presented here.

In *Yost v. General Motors Corp.*, 651 F. Supp. 656, 657-658 (D.N.J. 1986), the trial judge found the single plaintiff's pleadings grossly deficient. "The basic problem... is that plaintiff... has not alleged that he has suffered any damages." Although the court did mention a claim of diminished value, it noted that plaintiff "simply asserts the bald conclusion that [his car's] value in the market has decreased." *Id.* at 658. That decision, where the court relied on the rule that "conclusory allegations, unsupported by facts, cannot withstand a motion to dismiss," *id.* at 657, has no application to the present circumstances where cross-petitioners have made detailed allegations (and submitted an expert affidavit) concerning the nature and effect of a defectively designed product, and described the cause and magnitude of damages actually suffered.

The Court of Appeals further relied on *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982). At the start of his opinion, that trial judge noted that the defendant has "entered into a

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A. *Liability Under UCC § 2-314(2)(c)*

Contrary to the opinion of the Court of Appeals, other federal courts, as well as the Fourth Circuit itself, have found implied warranties breached with respect to *all* units of a certain good, even thought *not all* of the units failed to function.

In *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793 (D. Minn. 1980), for example, the court awarded damages to a merchant holding defectively designed CB radios. The actionable defect was "injury which resulted from the failure of the [radios] to withstand normal levels of shock and vibration." *Id.* at 803. Not all units failed in the presence of vibrations; the "problem led to a failure rate of somewhere between 30% and 67%...." *Id.* at 799. As the same defective design affected all the radios, however, and as buyers could not predict in advance which ones eventually would fail, the court awarded damages based on diminished resale value for all units. *Id.* at 802-803.

This same problem, the inability of the used car market to distinguish, in advance, the 5.7 liter GM

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voluntary recall program of the [defective] tires in question." *Id.* at 597. Thus, there could not have been, and was not, any specific claim for diminished resale market value for the used tires, as distinguished from some vague concept of UCC §2-714(2) "difference in value" *damages*, with no articulation of how implied warranties could be *breached* by the recalled and replaced tires.

diesels that will fail, led to the severely diminished resale value of *all* 5.7 liter GM diesels.

The Fourth Circuit itself reached a similar result in *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987). That decision, construing the South Carolina law of implied warranty,[22] upheld the liability of a manufacturer of asbestos fire-proofing used in a city hall, even though "no occupant of the city hall has yet developed an asbestos-related disease... [and] there are, as yet, no epidemiological studies concerning the health risks associated with asbestos contamination of office buildings.". *Id.* at 980n.2. The court explained that a plaintiff "should not be required to wait until asbestos-related diseases manifest themselves before maintaining an action." *Id.* at 978.[23]

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[22]Although plaintiffs seek to represent a nationwide class in this case, all of the named plaintiffs resided in South Carolina or purchased their GM diesels there. The Court of Appeals stated that whether diminished resale value claims are encompassed by the concept of merchantability is an issue governed by South Carolina state law, as a result of the definition of "implied warranty" in 15 U.S.C. §2301(7) as "an implied warranty arising under state law." (8a-9a.) Yet nowhere does the Fourth Circuit actually decide this issue by reference to South Carolina state law or, indeed, to the law of any other particular state.

[23]*See also, e.g., Pearl v. Allied Corp.*, 566 F. Supp. 400, 403-404 (E.D. Pa. 1985); *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 657 F.2d 814, 815 (6th Cir. 1981) ("[i]t is true that not all persons who breathed in asbestos fibers contract lung cancer and/or mesothelioma"). *Cf. 2000 Watermark Ass'n v. Celotex Corp.*, 784 F.2d 1183 (4th Cir. 1986) (sustaining implied warranty economic loss claim for "defective" roof that "blistered", on theory that even though the roof still did not leak (and in that sense remained "fit for its ordinary purpose"), the blistering reduced its life expectancy).

B. *Liability Under UCC §2-314(2)(a)*

The Court of Appeals did not even mention plaintiffs' separate merchantability claim under UCC §2-314(2)(a). The standard for "passing without objection in the trade" does not require functional impairment. Section 2-314(2)(a) was *intended* to cover *latent* defects causing diminished resale value. "[T]he test is not whether the trade would reject a latently defective item under tender, but rather whether it would accept it without objection if the defect were revealed." W. Hawkland, 2 *UCC Series* §2-314:07, at 330-332 (1982).

Under that test plaintiffs would not have bought these cars if the defective design had been disclosed. *See also, e.g., United California Bank v. Eastern Mountain Sports, Inc.*, 546 F. Supp. 945, 957 (D. Mass. 1982), *aff'd mem.*, 705 F.2d 439 (1st Cir. 1983) (finding a §2-314(2)(a) breach where flawed, but still functional "down" parkas could only be resold at substantially discounted prices).

Whether proceeding under §2-314(2)(a) or §2-314(2)(c), there was another factor overlooked by the Court of Appeals, which is sometimes referred to as price unmerchantability. As Official Comment 7 to UCC §2-314 notes, "[i]n cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index." *See also* J. White & R. Summers, *Uniform Commercial Code* 414-416 (3d ed. 1988); Speidel, "Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void," 67 *B.U.L. Rev.* 9, 41 (1987); *Lane v. Trenholm*

Building Co., 229 S.E.2d 728, 730 (S.C. 1976) ("a sale 'raises an implied warranty (against latent defects) from the fairness and fullness of the price paid' ").

Clearly, mechanically reliable transportation is *one* of the "ordinary purpose*s*" of automobiles, no doubt a primary one. But just as clearly, maintaining fair resale value is *another* of the "ordinary purpose*s*" of such an expensive purchase. Yet the decision of the Court of Appeals strips the UCC of its intended protections regarding latent defects, price, value retention, and all other concepts except that of functional performance.

A "very excellent forgery" of a Van Gogh painting could be fit for the "ordinary purpose" of artistic viewing, an impeccably crafted but imitation "antique" chair could be quite suitable for sitting, and an expensive home that the seller failed to disclose was situated directly over an active earthquake fault line could, at least for a while, provide a completely habitable dwelling. Yet, under the Fourth Circuit's holding, resale value merchantability claims that these goods were not "what they purport to be" would fail as a matter of law.[24]

---

[24]Speaking specifically of §2-314(2)(c), Official Comment 8 notes that "protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and *merchantable goods must therefore be 'honestly' resalable* in the normal course of business because they are what they purport to be [emphasis added]." There is no basis, and the Fourth offered none, for distinguishing here between the retail merchant and the new car buyer who expects eventually to resell in the highly organized used car market.

A latent defect causing severely diminished resale market value directly *breaches* the implied warranty of merchantability. Diminished resale value is not merely a form of indirect or consequential *damages*.[25]

These breaches (failure to pass without objection in the resale market and/or to fulfill the "ordinary purpose" of normal salability) are inextricably linked to allegations of defective design and the extraordinarily high failure rate of these GM diesel engines. This linkage confines the scope of the manufacturer's liability to results foreseeable from its own design, and does not expose the manufacturer to liabilities based upon market vagaries over which the manufacturer has no control.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be granted.

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[25]UCC §2-714(2) provides that "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

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February 26, 1990

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

MARY CARLSON, on behalf of herself and all others similarly situated,	)	
Plaintiffs	)	Civil Action No. 2:86-2674-1
v.	)	
	)	CLASS ACTION
GENERAL MOTORS CORPORATION	)	
Defendant.	)	

AFFIDAVIT OF GERALD ROSENBLUTH
REGARDING DIMINISHED RESALE VALUE

Gerald Rosenbluth, being duly sworn according to law, deposes and says:

1. I have been retained by plaintiffs for the purpose of giving expert testimony, by affidavit, regarding the diminished resale value of General Motors motor vehicles equipped with 5.7 liter diesel engines.

2. I am a resident of Tempe, Arizona, and have twenty years of teaching experience in the automotive field. I currently am, and have been for the previous eight years, under contract as the automotive expert for the State of Arizona Attorney General's Office. (Please refer to the attached *curriculum vitae*, Exhibit "A" hereto, for further elaboration on education and professional qualifications.)

3. I am knowledgeable with regard to the 5.7 liter General Motors diesel engine. I was instrumental in putting together an arbitration program for the State of Arizona with regard to that engine. In the course of putting together that arbitration program, and in connection with the current litigation, I have studied the design, manufacture, assembly, and performance characteristics of that engine in significant detail, and have become familiar with many of the resultant problems connected with that diesel engine and its related component parts.

4. The 5.7 liter diesel engine, which General Motors began to manufacture in 1978, is a converted gasoline engine. General Motors did not design this engine as a diesel engine from inception, and this converted engine was unusually prone to problems, precisely because it had not been originally designed as a diesel. Prior to adequate prototype design and durability testing, this converted engine and ancillary systems were placed in production. The conversion of the engine and ancillary systems, without adequate research, development and testing relative to differences between diesel and gasoline engine requirements and characteristics, resulted in epidemic problems with the engine.

5. A diesel engine's high compression ratio results in greater internal stresses and pressures than those experienced in a gasoline engine, and fuel is delivered

to a diesel engine by a high pressure injection pump, which is a critical component in diesel engine performance. The General Motors converted gasoline engine was originally designed to accept the internal stress that is characteristic of a gasoline engine. In the converted diesel engine, the resultant higher induced internal stresses, resulting from higher compression ratios in diesel engines (i.e. approximately twice that of gasoline engines), were excessive for this engine, as converted. As a result of conversion with only limited research, development and testing, the 5.7 liter diesel engine and related fuel injection system were defective, and require an inordinate number of repairs directly attributable to faulty design.

6. During the period covered by this lawsuit, General Motors knew that the 5.7 liter diesel engine and related fuel injection system were defective in design. The Federal Trade Commission had brought a lawsuit against General Motors, as had the New York State Attorney General, and numerous individual complaints had been received by General Motors. Nevertheless, General Motors continued to manufacture this converted engine until 1985.

7. The Center for Auto Safety, an independent, non-profit organization, which monitors and addresses automobile safety problems and vehicle defects, reported that, by the end of 1983, it had received more than 2,500 complaints regarding the General Motors 5.7 liter diesel engine, the second highest number of complaints that that agency had received in its thirteen years of existence. (See Affidavit of Clarence M. Ditlow, III, Executive Director of the Center for Auto Safety, at ¶4; appended hereto as Exhibit "B".) By comparison, the number of complaints received by the Center during the same period concerning the much larger number of comparable GM gasoline engines was

less than 200. *Id.* The Center for Auto Safety conservatively estimated that approximately one-third of the owners who purchased cars equipped with General Motors 5.7 liter diesel engines experienced engine breakdowns by the end of 1983, and owners have experienced numerous additional engine or engine-related breakdowns since 1983.

8. Because of this, the resale value of motor vehicles equipped with General Motors diesel engines is, and has been, severely depressed. As early as 1983, Mr. Ditlow, Executive Director of the Center for Auto Safety, noted that, "When GM diesel owners sell or trade their vehicle, they find the value of the car reduced by $2,000 to $5,000." (Exhibit "B" hereto, ¶14.)

9. Likewise, a March 27, 1983, article from the *New York Times* entitled "The Saga of the GM Diesel: Lemons, Lawsuits and Soon An FTC Decision" (which is appended hereto as Exhibit "C"), states that:

> "[T]he auto's reputation is so sullied that trade publications, such as the Kelley Blue Book, have substantially depreciated its resale value.... Diesel owners in Virginia also complain that even GM dealers routinely offer only half the book value on trade-ins—if they will accept the cars for trade-ins at all."

10. Appended hereto as Exhibit "D" is page 8 from the Center for Auto Safety's BBB Arbitration Guide which states that, "ABC found the GM diesel to average $3,600 less in value than the similar gasoline GM model". This is despite the fact that owners ordinarily paid more for their diesel automobiles than for comparable gasoline-powered models.

11. General Motors vigorously advertised and promoted the quality of these 5.7 liter diesel automobiles as dependable, durable and reliable. (I personally have reviewed such advertisements.) General Motors did not inform buyers of the problems experienced, or of the diminution of resale value.

12. While General Motors claimed that its 5.7 liter diesel engine was improved after 1980, it was substantially the same converted gasoline engine, and continued to experience problems now reflected in substantially diminished resale values. As stated at page 12 of the Center for Auto Safety's BBB Arbitration Guide (Exhibit "E" hereto), the post-1980 General Motors 5.7 liter diesel engines "are still nothing more than converted gasoline engines and suffer the same problems as the earlier models."

13. The GM diesel problem became so severe that a pro-diesel advocacy organization (the Diesel Automobile Association) urged GM in 1982 to stop using the word diesel in connection with its 5.7 liter engines, because the "alarming" malfunctioning of the General Motors 5.7 diesels "threatens to seriously harm the generic reputation of Diesel engines of all types." (Exhibit "F" hereto.) Eventually, in 1985, GM stopped manufacturing this engine.

14. General Motors has set up arbitration procedures in settlement of various lawsuits, including the Federal Trade Commission lawsuit. However, to the best of my knowledge, General Motors has never agreed in the course of those arbitrations to pay anything for diminished resale value.

15. Used car dealers, and new car dealers accepting trade-ins, almost universally utilize published value guides, which are sometimes referred to in the industry as "blue books". The value guides are

published by several different publishers, but reflect similar values.

16. One such widely used value guide is the Kelley Blue Book Auto Market Report. (Kelley Blue Book has informed me that the various regional editions of Kelley Blue Book all report substantially identical values.) A review of the Kelley Blue Book Auto Market Report-Official Guide for May-June, 1987 (Arizona-Nevada edition) indicates severely diminished resale value for motor vehicles equipped with GM 5.7 liter diesel engines, as compared to the same models equipped with gasoline engines.

17. Using the May-June, 1987 guide published by Kelley Blue Book Auto Market Report, I have prepared a a detailed printout for General Motors cars equipped with 5.7 liter diesel engines (Exhibit "G" hereto). It shows, separately for each model and model year (e.g. Buick Century 1981), the "base retail price" for the model when powered with the comparable gasoline engine (e.g. $3,910), and the monetary deduction indicated in the Blue Book for the same model and model year if powered with the 5.7 liter GM diesel engine (e.g. -$1,665), and Exhibit "G" also computes diminished resale value (e.g. $3,910 + 1,665) as a percentage (e.g. -42.5%). Comparing cars equipped with the 5.7 liter GM diesel engine to the identical models and model years equipped with the comparable gasoline engine, I found that the additional diminished resale value, which results from having the diesel engine, ranges from a low of approximately 20% to a high of more than 45% of the total value of the model. Using the information set forth in Exhibit "G", I found that for all General Motors models, averaged by model year, the additional diminished resale value, which results from having this engine, is as follows:

Year	Additional Diminished Resale If Diesel
1981	-37.56%
1982	-36.41%
1983	-32.81%
1984	-29.30%
1985	-26.40%
5 year average	-32.50%

In other words, the GM Motor vehicle is on average diminished by about *one-third of its total value* by reason of having this 5.7 liter diesel engine.

18. In order to determine whether the above diminished resale value results from the poor reputation of these 5.7 liter GM diesel engines, or results from other factors (such as, e.g., the reputation of all diesel engines, or the changing expense of diesel fuel), I performed a similar analysis to see if non-GM diesels suffered a similar diminished resale value. (To maintain comparability I used the "base" model only for each GM and non-GM model and model year.) In Exhibit "H", I have set forth diminished resale value information for diesel cars sold by Volkswagon of America. Of the thirteen Volkswagon models and model years for which I found information, the Blue Book indicated no additional diminished resale value for the diesel versions of six (i.e. the used car value of the diesel version and the gasoline-powered version is identical). For some Volkswagon models and model years a diesel engine did result in additional diminished resale value, but in no instance did a Volkswagon diesel engine create as much additional diminished resale value as the GM 5.7 liter diesel. Similarly, in Exhibit "H", I have set forth diminished resale value information for diesel cars sold by Toyota Motor Company. Of the four models and model years for which I found information, the Blue Book indicated no

additional diminished resale value for the diesel versions of two (i.e. the used car value of the gasoline-powered version and the diesel version is identical). For two Toyota models and model years a diesel engine did result in additional diminished resale value, but in no instance did a Toyota diesel engine create as much diminished resale value as the GM 5.7 liter diesel. From a comparison of the diminished resale values set forth in Exhibit "G" (GM cars) to the diminished resale values set forth in Exhibit "H" (Volkswagon and Toyota cars), which are far smaller in absolute amounts and as percentages, I can conclude with reasonable certainty that the severe diminished resale value suffered by all GM 5.7 liter diesels is due primarily to the poor reputation of this particular engine, rather than to factors affecting all diesels alike.

19. The severe diminution of resale value of GM diesels clearly is not due primarily to the changing prices of gasoline and diesel fuel (or the reputation of all diesels), because GM diesels have experienced a far greater diminution in value than many non-GM diesels. The changing cost of fuel, of course, would affect GM and non-GM vehicles substantially equally.

(Gerald Rosenbluth)
Gerald Rosenbluth

Sworn to and subscribed before me
this 2nd day of June, 1987.

Notary Public
My Commission Expires Dec. 10, 1990.

[Exhibits to Affidavit omitted]

APR 2 1990

No. 89-1379

In the Supreme Court of the United States

OCTOBER TERM, 1989

C.V. ALSTON, ET AL., PETITIONERS

v.

GENERAL MOTORS CORPORATION, RESPONDENT

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the South Carolina Uniform Commercial Code permits an action for diminished resale value of an automobile.

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On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (89-1164 Pet. App. 1a-23a) is reported at 883 F.2d 287. The opinion of the district court (89-1164 Pet. App. 24a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1989. Petitions for rehearing were denied on September 27, 1989 (89-1164 Pet. App. 43a-45a), and October 24, 1989 (*id.* at 46a-48a). On December 12, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 22, 1990, and the petition in No. 89-1164 was filed on that date. Petitioners state that their counsel received that petition on January 25, 1990. The cross-petition for a writ of

certiorari was filed on February 26, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this case is discussed in the main petition. 89-1164 Pet. 2-9. The facts relevant to the cross-petition are as follows.

Cross-petitioners are 12 individuals and one corporate plaintiff who seek to recover damages from respondent General Motors Corporation (GM) for breach of the "implied warranty of merchantability" on certain diesel automobiles, even though they claim not one penny of repair costs associated with the operation of their motor vehicles. Under what the court of appeals aptly called a "novel" theory (89-1164 Pet. App. 20a), petitioners claim that the implied warranty of merchantability—a warranty that arises by operation of law in every case and in no way depends on individual circumstances—is breached when a product has a "diminished resale value," even though the product performs its intended function entirely without incident.

Although petitioners brought their novel claim in federal court under the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, it is undisputed that the scope of the implied warranty of merchantability is a question of state law. As petitioners acknowledge at the outset (Cross-Pet. 2-3), the Act defines "implied warranty" as "an implied warranty arising under State law." 15 U.S.C. 2301(7). As petitioners likewise acknowledge (Cross-Pet. 14), Section 108 of the Act, 15 U.S.C. 2308, modified those state-defined implied warranties with certain federal

standards,[1] but nothing in the federal modifications of state law bears on the question whether the implied warranty covers "diminished resale value." Accordingly, in this Court as in the courts below, petitioners' entire argument turns on a construction of the Uniform Commercial Code (UCC), a statute that has been enacted in various forms in most States but has no federal force.

The district court rejected petitioners' novel construction of the UCC. The court applied South Carolina's version of the UCC, specifically S.C. Code Ann. § 36-2-314 (1976), on the ground that most of the named plaintiffs purchased their cars in South Carolina. 89-1164 Pet. App. 28a-29a & n.4. Relying on two cases that squarely rejected claims for diminished resale value, and noting that "[n]one of the cases cited by plaintiff[s] specifically holds that a plaintiff can establish a breach of the implied warranty of merchantability by proof of a likelihood of failure of the goods to perform," the court held that petitioners failed to state a claim on which relief could be granted. *Id.* at 29a-31a. As the court observed (*id.* at 32a):

> The warranty of merchantability guarantees that the warranted goods are fit for the ordinary purposes for which they are used. Thus, in this case, GM warranted that the cars it manufactured would be fit for driving and transportation. GM did not warrant to each purchaser that every other purchaser's car would be fit. As

[1] Thus, there is no question, and plaintiffs do not dispute (in either the cross-petition or the brief in opposition to the main petition), that the issue raised in the main petition—the construction of the term "conscionable" in 15 U.S.C. 2308(b)—raises a question of federal law.

> plaintiffs themselves point out, the alleged loss in resale value results from the poor reputation of the cars not from a manifest defect in any of the cars which have experienced no mechanical problems.

The court of appeals affirmed in pertinent part. Like the district court, and without objection by petitioners, the court of appeals applied South Carolina law to this question. 89-1164 Pet. App. 9a.[2] The court of appeals also noted that petitioners cited only "singularly unhelpful" cases that did not "address the substantive question of whether the implied warranty of merchantability protects against an unanticipated diminution in secondary market values." *Id.* at 20a. At the same time, the court noted numerous cases holding that the ordinary "purpose" of automobiles protected by the implied warranty of merchantability is providing reliable transportation —a purpose undisputedly fulfilled in this case. *Id.* at 21a-22a. "[I]t is for this reason that several courts have rejected claims similar to those pressed here." *Id.* at 22a.

GM has sought this Court's review of other aspects of the Fourth Circuit's decision, on an issue of federal law that would affect literally every sale of a consumer product covered by the Magnuson-Moss Act if the decision below were permitted to stand. The present conditional cross-petition, filed on behalf of 13 of the more than 130 respondents to GM's petition, seeks review of the Fourth Circuit's construction of the South Carolina UCC.

---

[2] Petitioners' statement that the court of appeals did not "explicitly look [ ] to the law of any particular state" (Cross-Pet. 15; see also *id.* at 18 n.22) is wrong.

ARGUMENT

The cross-petition should be denied. The issue it raises is one of state law and therefore wholly inappropriate for resolution by this Court. In any event, the decision below is plainly correct and consistent with all relevant precedent.

Petitioners make no claim to have presented an issue of federal law. They specifically admit that state law governs (Cross-Pet. 2-3, 14), and they ask this Court to construe the UCC (*id.* at 17-21). This Court, however, does not sit to review questions of state law. See, *e.g.*, *Volt Information Sciences, Inc.* v. *Board of Trustees*, 109 S. Ct. 1248, 1253 (1989); *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979); *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975).

Even if the question presented were one of federal law, there would be no reason to review the court of appeals' rejection of petitioners' claim. Petitioners' argument is that an automobile that functions exactly as intended is "unmerchantable" if it has a "diminished resale value" compared to some other benchmark. But unmerchantability is not a concept designed to protect against such future risks. Rather, "where a car can provide safe, reliable transportation it is generally considered merchantable." *Taterka* v. *Ford Motor Co.*, 86 Wis. 2d 140, 271 N.W.2d 653, 655 (1978), *quoted in* 89-1164 Pet. App. 22a. As one other decision, on which the courts below relied (*id.* at 22a, 29a), stated in squarely rejecting petitioners' theory:

> The majority of the tires sold to putative class members, by doing what they were supposed to do for as long as they were supposed to do it, clearly lived up to that "minimum level of qual-

> ity" which is all U.C.C. § 2-314(2)(c) requires. * * * Plaintiffs' bald assertion that a "common" defect which never manifests itself "*ipso facto* caused economic loss" and breach of implied warranty is simply not the law.

Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (emphasis omitted); see also *Yost v. General Motors Corp.*, 651 F. Supp. 656, 657 (D.N.J. 1986); *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1191-1192 (N.D. Ill. 1980), rev'd in part on other grounds, 660 F.2d 311 (7th Cir. 1981), cert. denied, 456 U.S. 974 (1982).

Petitioners cite no decision of a federal court of appeals or state court of last resort that even arguably conflicts with the decision below rejecting their claims.[1] Petitioners' reliance on *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987), and *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109 (1981), is misplaced. Those cases address the problems raised by a product (asbestos) that has negative health effects that manifest themselves only after a substantial time lapse; they have nothing to do with an attempt to recover "diminished resale value" damages for a product that safely performed its intended function. Likewise, *Lane v. Trenholm Building Co.*, 229 S.E.2d 728 (S.C. 1976), does not

---

[1] Petitioners cite several decisions of state and federal trial courts and state intermediate appellate courts, but those cases do not address the issue of diminished resale value of a product sold to a consumer under UCC § 2-314. In any event, a conflict between such a decision and a decision of a federal court of appeals has never been a ground for review by this Court—particularly when the question presented turns on state law.

aid petitioners' case. *Lane* was an action to recover damages for the sale of a house with a malfunctioning septic tank, and it has nothing to do with recovery of "diminished resale" damages on a properly functioning product.

We do not mean to downplay the practical importance of the issue that petitioners raise. Acceptance of petitioners' novel theory that "diminished resale value" is a basis for an implied-warranty claim would be a matter of wide application to consumers and businesses alike. But the court below correctly rejected that theory, and a challenge to an obviously correct determination of an issue of state law is not a proper occasion for the exercise of this Court's discretionary review power.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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